UNITED MALAYAN BANKING CORP. BHD.

v.

CHAN YEE CHUNG

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[ORIGINATING MOTION NO. 25-72-90]
23 MAY 1991

LAND LAW: *Ex parte application for removal of caveat - Power of Court to grant application - Application not served on caveator - Meaning of "if the circumstances so require" - Opportunity to be heard - Absence of grounds to defend application - National Land Code 1965, s. 327(1).*

The applicant chargee had obtained an order for sale under s. 256(3) of the National Land Code 1965 (NLC) in relation to the said property; however, it could not proceed with the sale as there was a caveat lodged on the said property by the respondent as purchaser under a sale and purchase agreement which was entered into with the chargor. The applicant now applies *exparte* for removal of this caveat.

The applicant had not served this application for removal on the respondent, contending that even if the caveator had been served, he would not have any answer to the chargee's application.

Held:

[1] There is clear evidence before the Court that the caveator had an address in Hong Kong; as the removal of the caveat would have serious consequences for him, he should be afforded an opportunity to attend the hearing and to resist the chargee's application. The mere fact that the caveator appears to have no grounds for resisting the application does not empower the Court to remove the caveat.

[2] The operative word in s. 327(1) of the NLC is "require", which involves an element of need. There was no sufficient material before the Court as to why the applicant should be relieved of the necessity to take steps to serve the application on the caveator.

[Applicant's application adjourned until steps taken to effect service of the application on the respondent.]

Cases referred to:

John v. Rees [1970] 1 Ch 345
Malayan United Finance Bhd. v. Tan Lay Soon [1991] 1 CLJ (Rep) 292
United Malayan Banking Corp. v. Sykt. Perumahan Luas Sdn. Bhd. [1988] 3 MLJ 352; [1988] 1 CLJ 577

Legislation referred to:

National Land Code 1965, ss. 256(3), 327(1)

Other source referred to:

Judicial Review of Administrative Action by de Smith, 4th Edn., p. 196

For the applicant - Hira Singh; M/s. Asbir, Hira Singh & Co., Ipoh

JUDGMENT

Edgar Joseph Jr J:

In this case, the registered chargee of land has applied to this Court under s. 327(1) of the National Land Code 1965, (the Code) for the removal of a caveat lodged on 8 August 1990 against certain land by the respondent who claims to be the purchaser thereof under an agreement for sale and purchase dated 3 July 1990 entered into by the chargor as vendor. The registered chargee had earlier successfully applied to the High Court Penang by originating summons to enforce the charge by way of an order for sale dated 10 July 1989 made pursuant to the provisions of s. 256(3) of the Code, the chargor having failed to show cause to the contrary. The sale of course could not be proceeded with by reason of the existence of the purchaser's caveat. Hence, the present application.

On the face of it, there would appear to be no answer to the chargee's application for removal of the caveat. Its rights are statutory and therefore in *rem* whereas the purchaser's rights being purely contractual are in *personam* against the chargor. In support, Counsel for the chargee has drawn my attention to the recent decision of the Supreme Court in *Malayan United Finance Bhd v. Tan Lay Soon* [1991] 1 CLJ (Rep) 292.

The problem however which faces the chargee is that its application for removal of the caveat has not been served upon the purchaser who, as I have said, is the caveator. But Counsel for the chargee says that the Court is empowered to make an *ex parte* order for removal of the caveat by virtue of the provisions of s. 327(1) which are as follows:

> Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (**acting, if the circumstances so require, *ex parte***) may make such order on the application as it may think just. (Emphasis provided)

But what are the circumstances relied upon by Counsel to persuade the Court that it should order removal of the caveat *ex parte*? Only this: namely, that the caveator even had he been served could have no possible answer to the chargee's application for removal regard being had to the decision of the Supreme Court in the *Malayan United Finance* case. But, does this alone satisfy the statutory requirement "if the circumstances so require"?

Now, it is not disputed that according to the sale and purchase agreement aforesaid (which Counsel tendered at the hearing,) the caveator has an address in Hong Kong; it is 1801, Honest Motors Building, 9-11, Leighton Road, Hong Kong. Is there any reason why the chargee should be relieved of the necessity of applying to this Court for service of the application outside the jurisdiction or, if having obtained such an order, and service outside the jurisdiction cannot be effected, why it should be relieved of the necessity of applying for an order dispensing with service or, if there is evidence that service is being evaded, why it should be relieved of the necessity of applying for an order for substituted service? No reason has been vouchsafed to this Court as to why the chargee should be relieved of the necessity of taking any of such steps.

On the contrary, there is clear evidence before this Court that the caveator appears to have an address in Hong Kong. The consequences of removal of the caveat may well be serious to him and however weak a case he may have he should be given the opportunity to attend the hearing and to resist the application for removal of the caveat. As Megarry J said in *John v. Rees* [1970] 1 Ch 345:

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determination that, by discussion, suffered a change.

Whilst it is true that the caveator's rights under the agreement would be in *personam* only and that too against the chargor, he may wish to impugn the order for sale itself as being a nullity which in law he would be entitled to do in collateral proceedings. (see, for example, *United Malayan Banking Corporation v. Sykt. Perumahan Luas Sdn. Bhd.* [1988] 3 MLJ 352.) Whether he can succeed in doing so is another matter and beside the point.

Professor de Smith has correctly observed that in the large majority of the reported cases where a breach of the *audi alteram* rule had been alleged, no notice whatsoever of the action to be taken had been given to the person claiming to be aggrieved, and that a failure to give prior notice had been the equivalent of a denial of the opportunity to be heard. (see *de Smith Judicial Review of Administrative Action*, 4th Edn., p. 196.)

As matters stand now, I am not prepared to hold that the mere fact that caveator appears to have no grounds for resisting the application for removal empowers the Court to hold that the circumstances require the Court to make an *ex parte* order for removal under s. 327(1). The operative word in s. 327(1) is the word "require". This word involves something more than a mere wish or desire on the part of the chargee; it involves an element of need. I do not consider that at this stage there is sufficient material before me to hold that the circumstances are such that I can make an *ex parte* order for removal of the caveat in accordance with s. 327(1).

The application for removal of the caveat is therefore adjourned to a date to be fixed by the Senior Assistant Registrar to enable the chargee to take the steps as to service outlined above.

Also found at [1991] 2 CLJ 1611